



California Fair Political Practices Commission

May 4, 1989

Lester J. Marston
Rapport & Marston
200 Henry Street
P.O. Box 488
Ukiah, Ca. 95482

Re: Your Request for Advice
Our File No. A-89-190

Dear Mr. Marston:

You have requested advice regarding the application of the conflict-of-interest provisions of the Political Reform Act (the "Act").^{1/} Your request is on behalf of Willits City Councilmembers Edwin Scott, Virginia Stransky, Herb Giese and Vic Hansen.

QUESTIONS

1. Are Councilmembers Scott, Stransky, Giese and Hansen disqualified from voting on the Harwood Energy Corporation's cogeneration use permit simply because they own property within the redevelopment zone?
2. Are these same councilmembers disqualified from voting on the Harwood cogeneration use permit because their businesses will be indirectly affected by the improvements made by the applicant if the mitigation measures are adopted as recommended in the final environmental impact report?
3. If the council cannot achieve a quorum because of disqualification, what is the procedure for making a decision on the cogeneration use permit?

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

CONCLUSIONS

1. Because they own commercial real property in the redevelopment area, the four councilmembers are disqualified from participating in the decisions to certify the environmental plan, amend the project area, or add territory to the redevelopment area, unless the decisions will have no financial effect on their property. They may also be disqualified from voting on various other mitigation measures, either because of the indirect effect on their property or because the measures are so interrelated that they cannot be separated and dealt with independently.

2. The councilmembers will not be disqualified on the basis of indirect effects on their business interests unless the decisions are likely to result in a \$10,000 or more increase or decrease in gross revenues, a \$2,500 or more increase or decrease in expenses, or a \$10,000 or more increase or decrease in value of assets or liabilities.

3. If the council cannot achieve a quorum because of disqualification, members who would otherwise be disqualified may be chosen at random to constitute a quorum and to participate under the rule of legally required participation.

FACTS

The Harwood Energy Corporation has applied to the City of Willits for a use permit to operate a cogeneration power plant facility. The proposed site is located within the city's redevelopment zone. The city council has determined that the proposed project will have a significant impact on the environment and has required that the applicant prepare an environmental impact report. The city has contracted with a consulting firm to prepare the report. The consultant is in the process of preparing the responses to the comments on the report and the city anticipates that a hearing will be held on the use permit during the first or second week in May.

City staff, in conjunction with the consultant who prepared the environmental impact report, have recommended mitigation measures for the project. They recommend moving the location of the project to a different portion of the same parcel. This would allow construction of a freeway off-ramp which would exit onto South Street in the event that Cal Trans constructs the proposed Highway 101 Willits bypass.

Further mitigation measures include certain improvements to Baechtal Road including street repavement, construction of curbs, gutters and sidewalks, and the construction of a stoplight at the intersection of Highway 101 and Baechtal Road. The recommended mitigation measure would also move the plant site partially outside the current boundaries of the redevelopment area. This

would necessitate amending the redevelopment plan to add territory.

The council must take a series of actions with respect to the proposal. They must certify the environmental impact report, thereby affirming that the document contains all of the mandatory requirements imposed by the California Environmental Quality Act "CEQA"^{2/} and regulations promulgated thereunder. They must then make a decision on the use permit. The decision on the use permit will involve a series of subdecisions relating to the measures proposed in the environmental impact report to mitigate the impact of the project on the environment. In order to grant the use permit, the council must either adopt the mitigation measures or make findings that benefit of the project outweighs the impact involved.

Four members of the city council own property within the redevelopment zone. Two of the members, Virginia Stransky and Herb Giese, own property which abuts on South Street. Councilmember Stransky owns a jewelry store which is 1,030 feet from the boundary of the plant site. Councilmember Giese is a realtor and his property is 890 feet from the plant site. Councilmember Hansen owns parcels on the western side of a shopping center which borders on Main Street, and the nearest boundary is 600 feet from the plant site. He leases part of the property to three businesses and has his office in the back of the center. Councilmember Scott's property is located at the intersection of Highway 101 and Baechtal Road, where he operates an appliance store. His property is 2340 feet from the power plant site and within 300 feet of the street improvements proposed for Baechtal Road.

ANALYSIS

Section 87100 prohibits public officials from making, participating in, or using their official position to influence any governmental decision in which they know or have reason to know they have a financial interest.

An official makes a governmental decision when he or she votes, commits his agency to a course of action, enters into a contract, or appoints someone. (Regulation 18700(b), copy enclosed.) Since the councilmembers would be voting on a series of proposals, there is no question that they will be making governmental decisions. The focus then turns to whether any councilmember has a financial interest in the decision to be made.

Section 87103 sets forth the test for determining whether a public official has a financial interest in a decision. That section provides, in part, as follows:

^{2/} Public Resources Code Section 21000, et seq.

An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family or on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.

(c) Any source of income, other than gifts and other and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

* * *

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.

(Section 87103, emphasis added.)

Foreseeability

The effects of a decision are reasonably foreseeable if there is a substantial likelihood that they will occur. To be foreseeable, the effects of a decision must be more than a mere possibility; however, certainty is not required. (Downey Cares v. Downey Development Com. (1987) 196 Cal.App.3d 983, 989-991; Witt v. Morrow (1977) 70 Cal.App.3d 817, 822; In re Thorner (1975) 1 FPPC

Ops. 198, copy enclosed.) The Act seeks to prevent more than actual conflicts of interest; it seeks to prevent even the appearance of a possible conflict of interest. (Witt v. Morrow, supra at 823.)

In this case, there are numerous decisions to be made relating to the environmental impact report and its recommended mitigation measures. As set forth above, four councilmembers own property and have business interests within a half mile of the proposed plant. Individual members own property and operate businesses which are in close proximity to various recommended mitigation measures. All own property within a redevelopment zone whose boundaries could change as a result of the decision. One of the intended effects of redevelopment is to improve the value of property located in the redevelopment area. (Downey Cares v. Downey Development Com., supra.) Based on the facts provided, it seems clear that there is a substantial likelihood that one or more of the decisions to be made will have a financial effect on each councilmember. If it is a material effect, the councilmember would have to disqualify himself or herself from participating in the decision.

Material Financial Effect

The Commission has adopted a series of regulations to determine whether a financial effect is material. In order to apply the regulations in a particular case, it is necessary to determine the nature of the economic interest affected and to examine both direct and indirect effects on those interests.

1. Material Financial Effect on Real Property in the Redevelopment Area.

a. Direct Effect on Interests in Real Property.

Each of the councilmembers owns real property in the redevelopment area. The effect of a decision will be deemed material if it directly involves real property in which the official has an ownership interest of \$1,000 or more. An official's involvement will be deemed direct and material as to certain major decisions relating to a redevelopment plan if the official's property is within the redevelopment area. Specifically, Regulation 18702.1 provides as follows:

(a) The effect of a decision is material if any of the following applies:

* * *

(3) Interest in Real Property -

* * *

(D) The decision is to designate the survey area, to select the project area, to adopt the preliminary plan, to form a project area committee, to certify the environmental document, to adopt the redevelopment plan, to add territory to the redevelopment area, or to rescind or amend any of the above decisions; and real property in which the official has an interest, or any part of it is located within the boundaries (or the proposed boundaries) of the redevelopment area.

(Regulation 18702.1(a)(3)(D), emphasis added, copy enclosed.)

Some of the decisions to be made by the councilmembers fall within Regulation 18702.1. The councilmembers must certify the environmental plan. They will be relocating the site of the power plant project, thereby amending the project area. They will be voting to amend the redevelopment plan to add territory to the redevelopment area. As to these decisions, the effect on the councilmembers' real property is deemed material under Regulation 18702.1, unless the decisions will have no financial effect on the councilmembers.

We do not have sufficient familiarity with the redevelopment area and the specific decisions presented to determine whether the decisions will have no financial effect on the councilmembers. You and the councilmembers are better able to make that judgment.

b. Indirect Effect on Interests in Real Property.

With respect to other decisions to be made by the council which do not directly affect the economic interests of the members, it must be determined if the effect of the decision is material under the appropriate regulations governing the materiality of indirect effects. (Regulation 18702(a), copy enclosed.)

Regulation 18702.3, (copy enclosed) sets forth the standards for determining whether the indirect effects of a decision will materially affect real property. That regulation provides in part:

(a) The effect of a decision is material as to real property in which an official has a direct, indirect or beneficial ownership interest (not including a leasehold interest), if any of the following applies:

(1) The real property in which the official has an interest, or any part of that real property, is located within a 300 foot

radius of the boundaries (or the proposed boundaries) of the property which is the subject of the decision, unless the decision will have no financial effect upon the official's real property interest.

(2) The decision involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the real property in which the official has an interest will receive new or substantially improved services.

(3) The real property in which the official has an interest is located outside a radius of 300 feet and any part of the real property is located within a radius of 2,500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the decision and the decision will have a reasonably foreseeable financial effect of:

(A) Ten thousand dollars (\$10,000) or more on the fair market value of the real property in which the official has an interest; or

(B) Will affect the rental value of the property by \$1,000 or more per 12 month period.

According to the facts presented, the four councilmembers own real property located outside a radius of 300 feet of the boundaries of the proposed power plant site but within a radius of 2500 feet. Therefore, with respect to decisions other than those major redevelopment decisions falling within Regulation 18702.1(a)(3)(D), supra, none of the four councilmembers would be disqualified from voting on the basis of a real property ownership interest unless the effect of the decision would increase or decrease the market value of the member's property by \$10,000 or more or the rental value by \$1,000 or more per year. ~~XXXX~~

c. Street Improvements on Baechtal Road.

The mitigation measures improving Baechtal Road would appear to have a material financial effect on Councilmember Scott. Regulation 18702.3(a)(2) states that an effect on real property is material if:

The decision involves construction of, or improvements to, streets, water, sewer, storm

drainage or similar facilities, and the real property in which the official has an interest will receive new or substantially improved services.

(Emphasis added)

The street repavement, new curbs, gutters and sidewalks, and the construction of a stoplight at the intersection of Baechtal Road and Highway 101, where Councilmember Scott has his business, would result in improved services to him of the type listed in the regulation.

You have not indicated that the properties of the other three councilmembers are likely to receive new or substantially improved services as a result of the improvements on Baechtal Road. Based upon other measurements you have provided, their properties would appear to be located more than 300 feet but less than 2500 feet from the improvements. Based on the facts provided Councilmembers Stransky, Giese and Hansen may participate in the decisions on the improvements unless the effect of the improvements would increase or decrease the fair market value of their properties by \$10,000 or more or the rental value by \$1,000 or more per year. (Regulation 18702.3(a)(3).)

You have not provided any information with respect to possible financial effects of the power plant on the surrounding property, however it seems likely that the construction would have some effect on property values. If the fair market value of any councilmember's real property would increase or decrease by \$10,000 or more as a result of the power plant, or if the property's rental value would change by \$1,000 or more per year, the effect of the power plant on that councilmember is material and he or she would be disqualified from decisions about the power plant. (Regulation 18702.3(a)(3).) In making any determination of financial effect, the following factors should be used as guidelines:

(1) The proximity of the property which is the subject of the decision and the magnitude of ~~the proposed project or change in use in relationship to the property in which the official has an~~ interest;

(2) Whether it is reasonably foreseeable that the decision will affect the development potential or income producing potential of the property;

(3) In addition to the foregoing, in the case of residential property, whether it is reasonably foreseeable that the decision will result in a

change to the character of the neighborhood including, but not limited to, effect on traffic, view, privacy, intensity or use, noise levels, air emissions, or similar traits of the neighborhood.

(Regulation 18702.3.)

2. Material Financial Effect on Businesses Located in the Redevelopment Area.

Since the real properties involved are commercial properties on which the councilmembers operate businesses, it is also necessary to evaluate the effect of the decisions on the business interests of the councilmembers. You have not provided any information as to the effect of the decisions regarding the construction of the power plant on the business entities owned by the councilmembers. Nor have you indicated the financial size of the business entities. Since we are dealing with local businesses, for the purpose of this analysis it is assumed that the businesses are not listed on any stock exchange, are not Fortune 500 companies, and do not have net tangible assets of at least \$4,000,000.^{3/} Having made these assumptions, the effect of a decision on a councilmember's business is deemed material only if:

(1) The decision will result in an increase or decrease in the gross revenue for a fiscal year of \$10,000 or more; or

(2) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$2,500 or more; or

(3) The decision will result in an increase or decrease in the value of assets or liabilities of \$10,000 or more.

(Regulation 18702.2(g), copy enclosed .)

~~You and the four councilmembers should examine the likely~~
~~financial effects of the power plant on their businesses and~~
determine whether those effects meet or exceed the above amounts.

^{3/} If our assumptions are incorrect, please contact us for additional advice.

3. Material Financial Effect on Sources of Income.

You have not indicated that any person or business entity which is a source of income (including gifts) to a councilmember is directly involved in the decision or materially effected thereby. However, each of the councilmembers runs a business. In this regard, it is important to remember that a source of income to the councilmember includes a pro-rata share of any income of any business entity in which the councilmember or his or her spouse owns a 10-percent or greater interest. (Section 82030(a).) If a councilmember's pro-rata share of any income from the business in the 12 months preceding the decision includes income of \$250 or more from a person or entity directly or indirectly involved in the decision, that councilmember may have a conflict of interest. The effect on sources of income to the councilmembers would also include the effect on the business entities which lease space from Councilmember Hansen.

"Public Generally" Exception

Even if it is ascertained that the effect will be material, the councilmembers may still be able to vote if the effect on their property is not distinguishable from the effect on the public generally. (Section 87103.) Regulation 18703 (copy enclosed) provides, in part:

A material financial effect of a governmental decision on an official's interests, as described in Government Code Section 87103, is distinguishable from its effect on the public generally unless the decision will affect the official's interest in substantially the same manner as it will affect all members of the public or a significant segment of the public.

The "public" is all the persons residing, owning property, or doing business in the jurisdiction of the agency in question. (In re Legan (1985 9 FPPC Ops. 1, 15, copy enclosed.) In the case of the city council, this would be the entire city. Consequently, ~~for the public generally exception to apply, any decision would have to affect a significant segment of the City of Williams in~~ substantially the same manner as it would affect the councilmember. (Dowd Advice Letter, No. A-88-214; Burnham Advice Letter, No. A-86-210, copies enclosed.)

The Commission has never adopted a strict arithmetic test for determining what constitutes a significant segment of the public. However, in order to apply the public generally exception, the population affected must be large in number and heterogeneous in nature. (In re Ferraro (1978) 4 FPPC Ops 62; Flynn Advice Letter, No. I-88-430, copies enclosed.)

In this case, you have indicated that the redevelopment area encompasses virtually the entire city. If the test for materiality is merely ownership of property within the redevelopment area, it would appear that a significant segment of the city would be affected in a substantially similar way as the four city councilmembers. Therefore, the councilmembers should not be disqualified from participating in the decisions merely because they own property within the redevelopment area.

However, in addition to comprising a significant segment of the jurisdiction, the group affected must be affected in a substantially similar way. In this case, the councilmembers are owners of commercial property. The effect of redevelopment decisions on commercial property is unlikely to be substantially the same as the effect on other property within the zone. (In re Owen, 2 FPPC Ops. 77, 81, copy enclosed.) The new cogeneration plant can be expected to bring new jobs to the community, increasing the markets for the various businesses involved, thereby increasing the value of the businesses and the underlying value of the commercial property. Therefore, the public generally exception would not apply to the councilmembers.

Even if a councilmember might be able to vote on a particular issue, he or she may still be disqualified if the issue cannot be separated from the disqualifying issues and dealt with independently. Thus, they would have to disqualify themselves if the result on one decision will effectively determine the result of the other decision. (Miller Advice Letter, No. A-82-119, copy enclosed.) It may be that the decisions to be made on the environmental impact report and on the use report are so interrelated that they cannot be separated in a way that will allow members to vote on some issues but not others. If this is the case, the councilmembers would be disqualified as to all issues.

To summarize the above, the councilmembers' participation in the decisions regarding the use permit would be as follows:

1. All four councilmembers would be disqualified from participating in the decisions to certify the environmental plan, amend the project area, or add territory to the redevelopment area, **unless these decisions would have no financial effect on the councilmembers.**

2. Councilmember Scott would be disqualified from participating in the decision as to the mitigation measures involving improvements to Baechtal Road.

3. All four councilmembers could participate in the remaining decisions, even though those decisions might have an indirect effect upon their real property or businesses, unless the effect is material under the tests previously discussed or they cannot be decided separately and independently.

Legally Required Participation

A councilmember who has a conflict of interest with respect to a particular decision may not make, participate in making or in any way use his or her official position to influence the decision. (Section 87100.) This means that the councilmember may not vote on the decision, participate in the negotiations, advise or make recommendations, give an opinion, contact, appear before or otherwise attempt to influence any member, officer, employee or consultant of the agency. (Regulations 18700 and 18700.1, copies enclosed.)

Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent that his or her participation is legally required in order for the action or decision to be made. However, the fact that an official's vote would be needed to break a tie does not make his or her participation legally required. (Section 87101.) A public official's participation is not legally required unless there is "no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision." (Regulation 18701(a), copy enclosed.)

If a public official who has a financial interest in a decision is legally required to make or to participate in making such a decision, he or she must:

(1) Disclose as a matter of official public record the existence of the financial interest;

(2) Describe with particularity the nature of the financial interest before he or she makes or participates in making the decision;

(3) Attempt in no way to use his or her official position to influence any other public official with respect to the matter;

(4) State the reason there is no alternative source of decision-making authority;

(5) Participate in making the decision only to the extent that such participation is legally required.

(Regulation 18701(b), emphasis added.)

Lester J. Marston
May 4, 1989
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Legally required participation is to be construed as a statutory analogue to the common law "rule of necessity." (In re Maloney, 3 FPPC Ops. 69, 74, copy enclosed.) Under this rule, where an administrative body has a duty to act upon a matter before it and is the only entity capable to act in the matter, the fact that its members may have a personal interest in the result does not disqualify them. (Gonsalves v. City of Dairy Valley, (1968) 265 Cal.App.2d 400, 404.) However, Regulation 18701(c) requires a narrow construction of "legally required participation." This has been interpreted by the Commission to require that steps be taken to minimize the bias that may result from the participation of individuals who are financially interested in the decision. (In re Hudson, 4 FPPC Ops 13, 17, copy enclosed.) Therefore, unlike the common law, the Commission requires that only so many financially interested persons participate in the decision as may be necessary to constitute a quorum. (Hudson, supra.) The preferred procedure for selecting which disqualified member(s) will participate is by lot or other random means of selection. (Hudson, supra, at p. 18.)

Therefore, to the extent that the city council cannot achieve a quorum by any other means, members who would otherwise be disqualified may be chosen at random to participate in the decisions in accordance with the procedure outlined above. The councilmembers chosen may each vote, but they may not participate in discussions. (Miranda Advice Letter, No. I-88-373; Skousen Advice Letter, No. A-88-162, copies enclosed.)^{4/} However, to the extent that an individual councilmember is required by CEQA to ask a clarifying question or make an evidentiary statement to perfect a record as to findings, this limited participation on the record would be permissible as legally required.

^{4/} The Commission has noticed amendments to Regulation 18701 which would permit the councilmembers to engage in discussions during public meetings, in addition to voting on decisions when their participation is legally required under Section 87103. A copy of the notice and text of the amendments is enclosed. These amendments will be considered for adoption on June 6, 1989.

Lester J. Marston
May 4, 1989
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If you have any further questions regarding this matter
please contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel

By: Margaret W. Ellison
Counsel, Legal Division

KED:MWE:plh

Enclosures

LAW OFFICES OF
RAPPORT & MARSTON
AN ASSOCIATION
OF
SOLE PRACTITIONERS

EPPC
March 31, 1989

DAVID J. RAPPORT
LESTER J. MARSTON

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March 28, 1989

Margaret Ellison, Esq.
Fair Political Practices Commission
Legal Division
428 J Street, Suite 800
Sacramento, California 95814

RE: Request for Opinion on Conflict of Interest
Our File No. W-2.7

Dear Ms. Ellison:

The purpose of this letter is to follow up on our telephone conversation of March 23, 1989, in which I requested a formal written opinion from the Fair Political Practices Commission on whether four members of the Willits City Council would be prohibited from voting on the issuance of a use permit for the Harwood Energy Corporation Cogeneration Facility.

As I relate to you in our telephone conversation the Harwood Energy Corporation has applied to the City of Willits for a use permit to operate a cogeneration power plant facility.

The City Council has determined that the project will have a significant impact on the environment and has required that the applicant prepare a environmental impact report. The City has contracted with a consulting firm to prepare the EIR. The consultant is in the process of preparing the responses to the comments on the EIR and the City anticipates that a hearing will be held on this use permit during the first or second week in May.

The proposed location for the site is within the City's redevelopment zone. Three Council members, Virginia Stransky, Herb Giese, Vic Hansen and Edwin Scott own property within the redevelopment zone. For your reference I have enclosed a copy of a map setting forth the boundaries of the redevelopment zone and indicating the approximate locations of the power plant site and council members parcels.

Three council members own property that is within approximately 300 feet of the project site. These council persons are Virginia Stransky, Vic Hansen and Herb Giese. These three council members also own property which abuts on South Street. Council member Scott's property is located at the intersection of Highway 101 and Baechtal Road.

City staff, in conjunction with the consultant which has prepared the EIR, have recommended mitigation measures for the project. This includes moving the location of the project on the same parcel to allow the construction of a freeway off-ramp which would exit onto South Street in the event that Cal Trans constructs the proposed Highway 101 Willits bypass.

Further mitigation measures include certain improvements to Baechtal Road (i.e. repaving of street, construction of curb, gutter and sidewalk) and the construction of a stoplight at the intersection of Highway 101 and Baechtal Road.

None of these improvements will provide a direct financial benefit to any of the Council members. However, an argument can be made that the proposed mitigation measures if implemented, would provide these council members with a better location for their businesses.

Based on these facts I am requesting an opinion from you on the following:

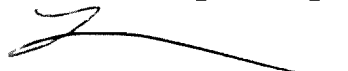
1) Does council member Scott, Stranksy, Giese and Hansen have a conflict of interest which prohibits them from voting on the Harwood Cogeneration use permit simply because they own property within the redevelopment zone?

2) Do these same council members have a conflict of interest that prohibits them from voting on the Harwood use permit because their businesses will be indirectly affected by the improvements made by the applicant if the mitigation measures are adopted as recommended in the final EIR?

As I stated above, this will be scheduled for a vote sometime during the first or second week of May. Therefore, I am requesting that you render an opinion on these issues prior to May 1, 1989.

If you need any additional information in order to render an opinion on these matters, please do not hesitate to give me a call.

Yours very truly,


LESTER J. MARSTON
City Attorney

Enclosure

cc: Bill Van Orden, City Manager

Edwin Scott, Mayor

Council Member Stransky, Giese & Hansen



California Fair Political Practices Commission

April 4, 1989

Lester J. Marston
Rapport & Marston
P.O. Box 488
Ukiah, CA 95482

Re: Letter No. 89-190

Dear Mr. Marston:

Your letter requesting advice under the Political Reform Act was received on March 31, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Margaret Ellison an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Diane M. Griffiths".

Diane M. Griffiths
General Counsel

DMG:plh

112157

LAW OFFICES OF
RAPPORT & MARSTON
AN ASSOCIATION
OF
SOLE PRACTITIONERS

DAVID J. RAPPORT
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April 20, 1989

Jill Stecher, Esq.
California Fair Political
Practices Commission
428 J Street, Suite 800
P.O. Box 807
Sacramento, California 95804-0807

RE: Request for Advice Letter
Letter No. 89-223
Our File No. W-2.7

Dear Ms. Stecher:

The purpose of this letter is to confirm our telephone conversation of April 20, 1989. In that conversation I advised you that there was an incorrect statement in my letter requesting an opinion from your office dated April 11, 1989. In that letter I stated that "under Ms. Rowland's contract with Mr. Giese, she pays him 10% of the gross profit that she receives from real estate sales through Mr. Giese's office". That statement is incorrect. Mr. Giese has two contracts with Ms. Rowland. The first contract is a broker-agent independent contractor employment contractor. Under that contract, a copy of which I have enclosed for your reference, Mr. Giese as a broker employs Ms. Rowland as an agent to list and sell real estate. Under the contract if Ms. Rowland sells any property listed with Giese Realty, the commission is paid directly to Mr. Giese. Mr. Giese then pays Ms. Rowland a percentage of the commission as set forth in Exhibit A of the contract entitled Brokers Fee Schedule.


In addition, Mr. Giese has entered into a "managing broker agreement" with Ms. Rowland. Under this agreement, a copy of which I have attached for your reference, Ms. Rowland assumes the responsibility of manager of Giese Realty in regards to all activities relating to real estate and the actions of real estate sales persons as of January 1, 1988. Under the agreement Mr. Giese pays Ms. Rowland 10% of the "gross commissions received by Giese Realty, to be paid within three days after receipt after commission check".

Ms. Rowland has been employed under a written contract with the Harwoods for the last 12 months. Under that contract the Harwoods pay her \$1,000.00 per month to be a "real estate consultant". As a real estate consultant she does a variety of real estate work for the Harwoods. She communicates purchase offers to the Harwoods she receives from real estate agents; she gives advice to the Harwoods on any particular offers received; she reviews escrow instructions; she keeps a list of all properties that the Harwoods own and whether those properties have been recently sold and she keeps track of the property taxes that are due and payable on each of these properties.

The work that she performs on behalf of the Harwoods is performed primarily at their offices approximately five blocks away from Mr. Giese's office. However, some of the work such as making phone calls and reviewing documents has been done in Mr. Giese's office. None of these calls are charged to Mr. Giese. All of them are charged to and billed to the Harwoods. None of the real estate sales agents that work in Mr. Giese's office or have worked for the last 12 months, have sold any of the Harwoods' properties. The Harwoods properties are not listed with Mr. Giese and none of the income that Ms. Rowland has received under her contract with the Harwoods has been paid to Mr. Giese.

I hope this information is useful to you in clarifying the relationship that presently exists between Ms. Rowland and Mr. Giese. If you need any additional information in order to issue the advice letter that we have requested, please do not hesitate to give me a call.

Yours very truly,


LESTER J. MARSTON
Attorney at Law

LJM/le
Enclosure
cc: Herb Giese



Office Realty



